

Supreme Court, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-1290

WILLIAM SCOTT SHEPHERD,)
Petitioner,)
vs.)
PEOPLE OF THE STATE OF CALIFORNIA)
Respondent.)

BRIEF OF RESPONDENT
IN OPPOSITION TO GRANTING OF
WRIT OF CERTIORARI

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TO THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA SECOND APPELLATE DISTRICT
DIVISION FOUR

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The respondent, People of the State of California, respectfully prays that the Petition for a Writ of Certiorari to review the judgment of the Court of Appeal

of the State of California, entered against petitioner in the matter of People v. William Scott Shepherd, 74 Cal. App. 3d 344 (1977), be denied.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California (Appendix "A" of the Petition) is reported at 74 Cal.App. 3d 334 (1977). The unpublished opinion of the Appellate Department of the Superior Court of the State of California, County of Los Angeles is also set forth in Appendix "A" of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether petitioner's federal First Amendment guarantee of free speech, as made applicable to the states by the Fourteenth Amendment, protected his oral solicitation for the unauthorized personal resale of excess football game tickets at the Los Angeles Memorial Coliseum in violation of a municipal ordinance prohibiting the unlicensed sale of anything on the grounds of any public park?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner was convicted of offering to sell three football tickets without a permit upon the premises of the Los Angeles Memorial Coliseum in violation of Los Angeles Municipal Code § 63.51(k). The ordinance reads as follows:

"Within the limits of any public park or recreational facility in the City of Los Angeles under the control, operation or management of the Board of Recreation and Park

Commissioners, the Los Angeles County Department of Parks and Recreation or the Los Angeles Memorial Coliseum Commission, no person shall:

". . .

"(k) sell or offer for sale any merchandise, article or thing of any kind or nature whatsoever unless such person possesses the written consent of said Board, Department or Commission."

The petitioner had three extra tickets for the afternoon's Los Angeles Rams professional football game. Standing near the north entrance to the Coliseum he offered the tickets at face value to an undercover police officer. After the officer determined that the petitioner had no permit, he was arrested.

After his trial and conviction in the Los Angeles Municipal Court, the petitioner appealed the judgment to the Appellate Department of the Superior Court of the State of California, County of Los Angeles. The Appellate Department

reversed the judgment of conviction. The judgment of the Appellate Department was certified to and accepted by the Court of Appeal of the State of California, Second Appellate District, Division Four, thus vacating the Appellate Department's opinion. The Court of Appeal, holding Los Angeles Municipal Code § 63.51(k) constitutional, affirmed the judgment of conviction, noting:

"The purpose and effect of the ordinance is not to censor or suppress the content of the seller's message, which may lawfully be communicated elsewhere. The limitation upon the use of the park for sales solicitation is, under the circumstances, a reasonable place limitation based upon a significant governmental interest."

People v. Shepherd, supra, p. 339;
Petition Appendix "A" p. 17.

ARGUMENT

THERE IS NO SUBSTANTIAL
FEDERAL QUESTION PRESENTED

The "speech" involved here does not involve the dissemination of information, ideas, opinions, views or beliefs, nor does it relate to the free flow of commercial information which is in the public interest. On this basis alone this case is distinguishable from Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). The petitioner makes no assertion that the tickets which he attempted to sell have any First Amendment content or involve social, political, aesthetic or moral beliefs.

Los Angeles Municipal Code § 63.51(k) withstands First Amendment strict scrutiny analysis. The use of a city park is a municipal affair, and the municipality has an interest in preserving the use of the park for the public benefit. In the case at bar, the City of Los Angeles has

an interest in protecting the Coliseum, its licensees and the public from unauthorized vendors whose interests would be incompatible with the orderly function of the park.

If it is assumed that the petitioner's activities are "speech" as contemplated by the First Amendment, even the petitioner concedes that this "speech" is subject to reasonable regulation as to time, place or manner if there is a sufficient governmental interest. [See Petition at p. 8.]

[With regard to First Amendment analysis], "laws regulating the time, place or manner of speech stand on a different footing than laws prohibiting speech altogether. Cf. e.g., Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949); Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)." Linmark Associates Inc. v. Township of Willingboro, 429 U.S. 938, 97 S.Ct. 1614 (1977).

The intent and purpose of Los Angeles Municipal Code § 63.51(k) is apparent. It is park regulation restricting the time, place or manner of unlicensed business activities within the City of Los Angeles with particular reference to public parks such as the Los Angeles Memorial Coliseum.

The governmental interests protected or asserted pursuant to the state police power are as follows: 1) preserving areas for recreational use and enjoyment by preventing park patrons from being subjected to unlicensed and uncontrolled numbers of vendors; 2) avoiding congestion of pedestrian traffic around the Coliseum; 3) protecting the municipality's proprietary interests relating to sales in the park by its licensees, and; 4) protecting consumers from peddlers of counterfeit or stolen tickets and other injurious items when the anxiety and excitement of a sporting event is close at hand, and the interest in tickets is high.

By licensing the concessionaires, the municipality can regulate the places of operation and business methods, and it

can easily identify the authorized sellers. An ordinance which attempted to distinguish between the casual vendor and the commercial operator would be ineffective due to the practical problems of identification of sellers.

The ordinance in no way affects an individual's ability to sell these tickets on private property or on public property other than public parks. Under the ordinance in question a person has the right to dispose of his personal property by offering it for sale or giving it away -- but he is not entitled to use the Coliseum for that purpose. The petitioner's discussion regarding Los Angeles Municipal Code § 42.03 is irrelevant and inappropriate in that the petitioner was not arrested, charged or convicted pursuant to that code section, and its constitutional viability is open to argument in state court. People v. Van Wong, 165 Cal.App. 2d Supp. 821 (1958); Welton v. City of Los Angeles, 18 Cal.3d 497 (1976).

The purpose of § 63.51(k) is not to censor or suppress the content of the petitioner's message as petitioner has

implied (cf., Linmark Association Inc. v. Township of Willingboro, supra). Los Angeles Municipal Code § 63.51(k) is a reasonable limitation upon the use of a municipal public park for sales solicitation, and the regulation is based upon significant governmental interests.

THERE IS NO CONFLICT OF DECISION

After a searching examination and evaluation of the issues presented in the instant case, the California Court of Appeal concluded that Los Angeles Municipal Code § 63.51(k) was constitutional as applied. The Court of Appeal acted correctly in construing the ordinance so as to avoid an interpretation that the ordinance was unconstitutional.

"So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed [citations]; and it is to be presumed that state laws will be construed in that way by the state courts."

Fox v. Washington, 236 U.S. 273, 277, 35 S.Ct. 383, 59 L.Ed. 573 (1915)

10.

". . . [W]e take for granted that the ordinance will be so read to avoid raising difficult constitutional problems which any other application would present."

Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 724, 71 S.Ct. 909, 95 L.Ed. 1317, 1325 (1951).

These rules of construction are binding upon and followed by the California Supreme Court:

"We must, however, presume that the legislature intended to enact a valid statute: we must, in applying the provision, adopt an interpretation that, consistent with the statutory language and purpose eliminates doubts as to the provision's constitutionality [citations]."

In re Kay, 1 Cal.3d 930, 942, 83 Cal.Rptr. 686, 464 P.2d 142, (1970).

"Although a broad construction would infest § 626.4 [of the Penal

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Code] with many of the asserted constitutional infirmities, we believe that a narrower interpretation will both effectuate the legislative purpose of the statute and confine it within constitutional parameters."

Braxton v. Municipal Court,
10 Cal.3d 138, 144 (1973).

This is necessary because a literal reading might appear too broad:

"We point out, however, that the statute, if literally applied, would succumb to constitutional attack both because of First Amendment overbreadth and vagueness."

Braxton, supra, at p. 144.

The Court of Appeal was correct in construing Los Angeles Municipal Code § 63.51(k) as a reasonable regulation in light of a compelling municipal interest. It is undisputed that the petitioner was offering tickets for sale on the Coliseum grounds. The statute was correctly applied to the petitioner's conduct. In so doing the lower court followed the

very purpose of the enactment.

". . . [W]e follow the well-settled principle that if 'the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution' [citations]."

Braxton v. Municipal Court, supra, at p. 145.

There is no conflict with regard to the constitutionality of the ordinance at the state level, and the petitioner's reliance on Virginia Pharmacy Board v. Virginia Citizens Consumer Council, supra, and Linmark Associates Inc. v. Township of Willingboro, supra, is misplaced. Neither of these authorities indicate a conflict of decision on the federal level with the state court's determination. Both of these cases are distinguishable from the petitioner's case.

The cases cited by petitioner involve nearly absolute restrictions on commercial communication (advertising) by businesses on private property. Further, in both of the cases relied upon by petitioner this Court held that the public had a significant interest in receiving the restricted communications.

In Linmark Associates Inc. v. Township of Willingboro, supra, this Court noted that the ordinance was not concerned with time, place or manner restrictions but with the content of the speech.

In the case at bar the petitioner has conceded that there is no First Amendment content in the tickets. The ordinance related to the power of a municipality to protect public parks, and not to the regulation of business on private property. Any time, place or manner restrictions set forth by this ordinance are compatible with First Amendment analysis, and under the ordinance petitioner has alternative methods available for disposition of his tickets.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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